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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 772

SIGNAL OIL AND GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR OKLAHOMA NATURAL GAS COMPANY AND LONE STAR GAS COMPANY IN OPPOSITION

OPINIONS BELOW

The Federal Power Commission's opinion and accompanying order (J. App. 433a-468a) are unofficially reported at 12 P.U.R. 3d 3. The Commission's order denying rehearing (J. App. 494a-499a) is reported in preliminary print at 15 F.P.C. 1020. The opinion of the Court of Appeals (Pet. App. A, 1a-7a)[1] is reported at 238 F. 2d 771.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1956 (Pet. App. B, 7a-8a). The petition for a writ of *certiorari* was filed on February 14, 1957. The jurisdiction of this Court is invoked under

[1] Petitioner's Appendices A, B and C are set forth in its petition for a writ of *certiorari*.

28 U.S.C. 1254(1) (1952) and § 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. 717r(b) (1952).

QUESTION PRESENTED

Whether under the authority of § 7(e) of the Natural Gas Act the Federal Power Commission may condition a certificate of public convenience and necessity so as to permit a sale at an initial rate no higher than that found after hearing to be required by the public convenience and necessity.

STATUTE INVOLVED

The relevant portions of the Natural Gas Act are set forth in petitioner's Appendix C at pp. 8a-11a.

STATEMENT

Petitioner, operator of a gasoline plant in Carter County, Oklahoma, on August 24, 1954, filed with the Federal Power Commission (Commission), at Docket No. G-2570, an "Application for Certificate of Public Convenience and Necessity Under Section 7 of the Natural Gas Act, as Amended". Said application requested that the Commission authorize a sale of residue gas at a price beginning at 12¢ per Mcf, two cents higher than any sale in the area, to Cities Service Gas Company (Cities Service) for transportation in interstate commerce and resale in accordance with a contract between petitioner and Cities Service (J. App. 221a-227a).[2]

[2] On the same day, petitioner by telegram requested a temporary certificate covering such sale under § 7(c) of the Act. The following day the Commission by telegram granted the temporary authorization stating that such authorization was "without prejudice to such disposition of the application at Docket No. G-2570 as the record may require" (J. App. 228a).

Pursuant to §§ 154.92 and 154.93 of the Commission's Regulations under the Act (Pet. App. C, 11a-12a), requiring the filing of a rate schedule to cover any proposed sale, including a temporary sale, petitioner on September 7, 1954, filed its contract with Cities Service as a rate schedule (J. App. 317a-318a). The Secretary of the Commission advised petitioner by letter that the contract had been accepted for filing and had become effective on October 8, 1954. The acceptance contained the following qualifications (J. App. 319):

> "This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company."[3]

A week later, in the proceeding at Docket No. G-2570, Oklahoma Natural Gas Company (Oklahoma Natural) filed a petition for leave to intervene, application for vacation of the temporary certificate and protest

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[3] Section 154.101 of the Commission's Regulations (Pet. App. C, 12a) governing petitioner's rate schedule filing provides:

> "*Acceptance for filing not approval.* Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act." (Commission's italics).

against petitioners proposed rate schedule (J. App. 229a-238a), a copy of which was served on petitioner. This pleading asserted Oklahoma Natural's interest in the proceeding, and opposition to certification at the rate proposed to be charged by petitioner. The prayers requested, *inter alia*, "that the current price for gas sold by [petitioner] to Cities Service * * * be established at 10¢ per M. c. f.", in lieu of the 12¢ per Mcf price proposed by petitioner (J. App. 237a).[4]

In its order issued October 18, 1954, granting Oklahoma Natural's intervention, the Commission addressed itself to Oklahoma Natural's motion and other pleadings attacking petitioner's proposed rate (J. App. 300a-303a). By this order the Commission gave express notice to petitioner and all parties that the 12¢ rate proposed by petitioner was an issue to be determined after hearing on the certificate application (J. App. 302a).

Lone Star Gas Company (Lone Star) thereafter also filed a petition for leave to intervene at Docket No. G-2570 (J. App. 289a-299a), a copy of which was served on petitioner. Lone Star stated the manner in which it would be aggrieved by an increase in the area price of natural gas from 10¢ to 12¢ per Mcf, and spelled out the impact of such a price increase upon

[4] On the same day Oklahoma Natural filed a "Protest and Motion for Rejection of Proposed Rate Schedule" (J. App. 500a-502a), with service to petitioner, protesting against the rate schedule providing for the 12¢ rate. A few days later Oklahoma Natural filed an "Application for Rehearing or Modification" (J. App. 257a-277a), with service to petitioner, requesting that the temporary authorization to petitioner be revoked or modified as to the 12¢ rate. It also filed a "Supplement to Protest and Motion for Rejection of Proposed Rate Schedule" (J. App. 503a-504a), with service to petitioner, again attacking the rate.

the hundreds of thousands of ultimate consumers it serves. This petition specifically requested "that any certificate issued in these proceedings be continued so as to require Signal to file an initial rate schedule which does not exceed the current price paid in the area" (J. App. 299a). The Commission granted Lone Star's intervention (J. App. 307a-308a).

Both Lone Star and Oklahoma Natural participated actively in the Commission's hearing on petitioner's application for a certificate under § 7(c) of the Act, adducing voluminous evidence showing that the 12¢ price would be contrary to the public convenience and necessity (J. App. 98a-141a).

The record shows that Oklahoma Natural is engaged in the local distribution of natural gas in the State of Oklahoma, serving some 320,000 customers, and that Lone Star is a natural gas company subject to the jurisdiction of the Commission and is engaged in the transportation and local distribution of natural gas to more than 650,000 customers in the States of Texas and Oklahoma. The record shows that the highest price paid for natural gas in the area of petitioner's sale is 10¢—2¢ less than the price proposed by petitioner. The record shows further that if the sale by petitioner were permitted at the price proposed, the inevitable result would be that the price of gas in the area, including gas purchased by Oklahoma Natural and Lone Star, would be driven upward to 12¢, thereby increasing the cost of gas to the customers of Oklahoma Natural and Lone Star by approximately $3,140,000 annually, and the cost of gas to Cities Service's customers by $1,000,000 annually (J. App. 130a, 440a-442a). The Commission held that on the evidence petitioner could be granted a certificate only upon

a condition that it file a rate schedule providing for a rate of 10¢ (J. App. 440a-455a; 494a-499a).

Petitioner filed a petition to review the Commission's decision in the United States Court of Appeals for the Third Circuit under § 19(b) of the Act. Oklahoma Natural and Lone Star were permitted to intervene in support of the Commission's decision.

DECISION OF THE COURT OF APPEALS

The court below held that the authority of the Commission under § 7(e) to impose the rate condition is clear from the language of the section, is supported by the legislative history, and that such rate condition is consistent with the Commission's practice over a number of years. It held further that the Commission's specific authority to condition under § 7(e) permits the setting of a particular rate and that substantial evidence supports the Commission's finding that public convenience and necessity require the certificate to be conditioned on a 10¢ rate.

ARGUMENT

This proceeding involves action by the Commission under the authority of §§ 7(c) and (e) of the Act. The Commission held a hearing on petitioner's application for a certificate under these provisions and, on the evidence, concluded that the public convenience and necessity required issuance of the authorization requested only if the proposed price were reduced to 10¢ per Mcf. Sections 7(c) and (e) are the only sections of the Act providing for the certificate regulation of proposed services and sales subject to the Commission's jurisdiction. The procedure followed

and decision reached were in full compliance with § 7's governing statutory provisions.

Petitioner does not contend that the Commission's findings were not supported by substantial evidence or that the court below erred in so holding. Nor does petitioner contend that the condition was not required by the public convenience and necessity. It argues only that the Commission may not legally attach the condition in question because § 5(a) prescribes procedures and standards for regulating rates in certain circumstances and that such procedures and standards must be adhered to where the Commission, under the authority of § 7(e), conditions certificate authorization upon a definite lower rate. Petitioner further argues that attachment of the rate condition under § 7 deprives petitioner of its property without due process of law since petitioner was given notice only of a proceeding under § 7.

There is no reference in § 7 of the Act to the provisions or authority contained in § 5, nor is there any reference in § 5 to the provisions and authority contained in § 7.

1. Commission Action Fully Authorized by § 7 and Properly Exercised

Section 7(e) of the Act provides clear authority for the Commission's attachment of the condition to the certificate. That section provides that the Commission shall issue a certificate authorizing a sale of gas:

> "* * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules,

> and regulations of the Commission thereunder, and that the proposed service, sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * * ."

The same section grants express authority to condition certificates as follows:

> "* * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

Under the command of § 7(e) the Commission shall deny a certificate not found to be required by the present or future public convenience and necessity. Where the Commission finds that the terms proposed for a sale for which authorization is sought are such that authorization is not required by the public convenience and necessity, it may, by the exercise of its power to condition the certificate, grant authorization on "such reasonable terms and conditions as the public convenience and necessity may require". It did that in the instant case.

There can be no question that the impact on the public of rates proposed by an applicant is a matter which the Commission may consider in determining "public convenience and necessity". This Court has repeatedly held that the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610, 612 (1944); *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 581 (1949). In

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 (1954), where this Court held a company such as petitioner to be a "natural-gas company" under the Act, it said, at 685:

> "Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act."

No single consideration in determining whether a proposed sale will serve public convenience and necessity is more important than the impact of the rate structure. As the court below recognized (Pet. App. A, 4a-5a, n. 3), Congress intended that such matters be considered at the outset in connection with the issuance of the certificate "at a time when such vital matters can readily be modified as the public interest may demand".[5]

The Commission on substantial evidence found that the granting of the certificate at the price proposed in the application would be contrary to the public interest and concluded as follows (J. App. 452a):

> "In the face of admitted injury to many parties in this proceeding, we are convinced that a rate structure which has prevailed in this area for some time should not be disturbed without a showing more substantial than appears on this record that such a change is necessary and that the level to which the rates are proposed to be changed is itself just and reasonable. We find that the certificate applicants herein have failed to demonstrate that a rate level of 12 cents per Mcf is necessary in the public interest or that the public convenience and necessity which requires the issuance of this certificate dictates a finding

[5] H. Rept. No. 1290, 77th Cong., 1st Sess., pp. 2-3 (1941).

> that a rate of 12 cents is necessary to ensure the economic feasibility of the project."

Thus to protect the public interest, the certificate was conditioned as follows (J. App. 455a):

> "The certificate granted in paragraph (B) hereof shall be granted upon the express condition and requirement that Signal file a rate schedule with the Commission within 30 days from the date of issuance of this order providing for a rate of ten (10) cents per Mcf in lieu of its proposed rate of 12 cents per Mcf for natural gas delivered and sold Cities Service from the Fox Gasoline Plant; otherwise the order in this proceeding shall be null and void in its entirety."

In response to petitioner's suggestion that the Commission might later take action concerning petitioner's rates under § 5 and should therefore issue the certificate without a rate condition, the Commission found that damage to the public could be prevented only by imposition of the condition (J. App. 450a-453a). It stated "our action designedly is an interim measure calculated best to protect the public interest in a timely manner" (J. App. 451a).

2. Legislative History Comfirms Power to Attach Rate Conditions

There is no ambiguity in the broad grant of authority to the Commission and the inclusion of rate conditions is within the scope of such authority. If there were any doubt that the conditioning authority includes conditions as to rates, it would be dispelled by the legislative history of § 7. Section 7(e) was added by amendment to the Act in 1942. The House Com-

mittee on Interstate and Foreign Commerce in favorably reporting the amendment said:[6]

> "By the unregulated construction of a pipe line, uneconomic construction, or inflated costs may make proper regulation of operation thereafter difficult or practically impossible. The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand."[7]

The Senate Committee on Interstate and Foreign Commerce likewise reported the bill favorably, indicating that it would give the Commission certificate power "which it should have and should exercise in the public interest" respecting, among other things, "the characteristics of the rate structure".[8]

At the hearings before the House it was made clear to the Committee that § 7(e) authority to condition was intended to include authority to attach rate conditions.[9]

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[6] H. Rept. No. 1290, 77th Cong., 1st Sess., pp. 2-3 (1941).

[7] Petitioner is a "natural-gas company" under the Act and subject to its provisions as any other natural gas company whether an interstate pipeline transporter or an independent producer selling in interstate commerce. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[8] S. Rept. No. 948, 77th Cong., 2d Sess., pp. 1-2 (1942).

[9] Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., pp. 23-24 (1941).

In commenting on the bill[10] which eventually became the 1942 amendment to the Act and which included the express authority to condition, the Commission said:[11]

> "The proposed bill in all its provisions seems well adapted to accomplish the avowed purpose of vesting in the Federal Power Commission complete regulatory control through the instrumentality of the certificate of public convenience and necessity over the transportation and sale of natural gas and all extensions and new construction of pipe lines and other facilities by natural-gas companies."

As reported by the House Committee, the bill was passed by the House and Senate without amendment.

At the time § 7(e) was enacted granting specific authority to condition certificates, §§ 4 and 5 relating to rates were part of the Act. Nevertheless no problem was envisaged in granting the certificate authority to include rate conditions.

Congress in meticulously providing the procedure and standard to be followed in § 7(e) carved out no exception and included no requirement that the different procedure and standard of another section were to be followed in determining the effect of the rate structure on the public convenience and necessity. This it could easily have done and cannot be said to have been overlooked since consideration was given to the authority under § 7(e) to condition as to rates.[12]

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[10] H.R. 5249, 77th Cong., 1st Sess. (1941).

[11] Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., p. 82 (1941).

[12] See *supra*, p. 11, n. 9.

Petitioner attempts to draw a distinction between rate conditions which prescribe a "definite and specific rate", and other types of rate conditions. It argues that the Commission has not previously attached exactly the same condition in other certificates and therefore may not now do so (Pet. 15). This is specious reasoning. In view of the specific statutory authority to attach "such reasonable terms and conditions as the public convenience and necessity may require", the presence or absence of precedent for a particular type of condition is wholly immaterial. Obviously, the necessity for attachment of any given condition must depend upon the requirements of public convenience and necessity under the circumstances of a particular case presented to the Commission for decision. As the circumstances of cases vary, so also will the nature of the conditions required. Moreover, attachment of conditions imposing a definite and specific rate ceiling is not without precedent in Commission experience. *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 203 F. 2d 494 (C.A. 3, 1953); *Arkansas Louisiana Gas Co.* v. *Federal Power Commission,* 113 F. 2d 281 (C.A. 5, 1940).

Petitioner would attribute to Congress an intent to grant to the Commission an impotent power under §7(c) to "in its discretion, scrutinize the characteristics of the rate structure of an interstate gas pipeline certificate applicant in passing upon its certificate application", without the power to act as a result of its scrutiny (Pet. 12-13). Petitioner says that "the power to scrutinize is not equivalent to the power to modify and fix rates" (Pet. 13). But the Commission, by attaching the condition that a 10¢ rate be filed did no more than was stated in the House Committee

Report[13] to be the purpose of the scrutiny, *i.e.*, to modify the rate structure "at a time when such vital matters can readily be *modified* as the public interest may demand" (emphasis supplied).

The Commission, by conditioning the certificate so as to hold the rate to a level required by the public interest, has not required the filing of a modified rate. It has simply exercised its discretion as required by the public interest to prevent a proposed rate from becoming effective. While petitioner may now make the sale, if it so desires, at the 10¢ rate found to be compatible with the public interest, the Commission order does not *require* petitioner to sell at such rate, or at any other rate. Petitioner is at liberty to elect not to render the service as authorized.

3. Commission, With Judicial Approval, Has Routinely Exercised Its § 7(e) Authority to Impose Rate Conditions in Certificate Orders

The Commission's annual reports present abundant statistical evidence of its long-established practice of attaching rate conditions to § 7 certificate orders.[14] While such rate conditions have been cast in a variety of forms,[15] the requirements of public convenience and necessity form a common denominator for all.

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[13] *Supra*, p. 11.

[14] Twenty-ninth Annual Report (1949), pp. 114-119; Thirtieth Annual Report (1950), pp. 115-116; Thirty-first Annual Report (1951), pp. 109-110; Thirty-second Annual Report (1952), pp. 110-111; Thirty-fourth Annual Report (1954), pp. 127-128; Thirty-fifth Annual Report (1955), pp. 135-137; Thirty-sixth Annual Report (1956), p. 88.

[15] See, *e.g.*, *Re Tennessee Gas Transmission Co., et al.*, 9 F.P.C. 271, 291, 295-296 (1950); *Re Colorado Interstate Gas Co., et al.*, 10 F.P.C. 778, 780 (1951); *Re Trunkline Gas Supply Co.*, 8 F.P.C.

It is significant that the Commission's use of rate conditions in § 7 proceedings pre-dates the 1942 amendment which added subsection (e) thereof. *Supra,* n. 10.

One year after the 1938 enactment of the Natural Gas Act, in issuing a certificate to a natural gas company, the Commission imposed the condition that any new service undertaken by applicant "during the life of this certificate" must be rendered at the rate approved in such order. *Re Louisiana-Nevada Transit Co.,* 2 F.P.C. 546, 549 (1939). Upon review, the Court of Appeals affirmed: *Arkansas Louisiana Gas Co.* v. *Federal Power Commission,* 113 F. 2d 281 (C.A. 5, 1940). Although basing its decision upon other grounds, the court answered Arkansas Louisiana's contention that it was beyond the power of the Commission to impose rate conditions, saying (113 F. 2d at 283): "[W]e find nothing in the statute which prevents the commission from imposing in the interest of the public to be served by the [applicant], reasonable conditions upon the granting of a certificate * * *." This decision and the rate condition involved were cited in the House hearing as an example of the authority to condition which would be specifically authorized by the amendment.[16]

Since the 1942 amendment, rate conditions in certificate orders have been uniformly upheld in the limited number of cases presenting this issue to the courts.

250, 257, 260 (1949), 9 F.P.C. 721, 729-730, 739, 741 (1950), 10 F.P.C. 185, 188-189, 207-208 (1951), 10 F.P.C. 1395, 1396 (1951); *Re Michigan-Wisconsin Pipe Line Co.,* 5 F.P.C. 953, 955 (1946), 6 F.P.C. 1, 20 (1947), aff'd. *sub nom., Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 169 F. 2d 881 (C.A.D.C., 1948), *cert. den.,* 335 U.S. 854 (1948).

[16] See hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, pp. 23-25.

The court below took note of this fact (Pet. App. A, 5a, n. 4), and quite properly rejected any restriction of the Commission's § 7(e) conditioning authority on the basis of an alleged distinction either between the status of independent producers and that of pipeline companies, or between particular types of rate conditions (Pet. App. A, 6a).

Until the decision in the *Phillips* case, *supra*, n. 7, the Commission had not regulated independent producers, such as petitioner. Petitioner's application was filed less than three months thereafter and, consequently, was among the first applications filed by a producer-seller to be considered by the Commission. Thus, the fact that, prior to the *Phillips* decision, rate conditions had been attached only to certificates issued to pipeline companies is of no legal significance.

4. No Conflict Between §§ 7 and 5

Section 5(a) of the Act provides procedures for the Commission to follow when it investigates any rate "demanded, observed, charged or collected" for the purpose of determining whether it is unjust, unreasonable, unduly discriminatory or preferential. Thus, it deals with sales which have been authorized and rates being charged, not those proposed.[17] Until authorized by a certificate under § 7, no sale may be made and

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[17] The Commission pointed out the difference in criteria between §§ 5 and 7 as follows (J. App. 497a).

> "We do not hold that the issue of rates in a certificate proceeding is identical in scope and effect with that in a Section 4 and Section 5 proceeding. The rate we deem proper to be charged if a certificate should issue is not necessarily the same we could find to be the lowest reasonable rate under Section 5. Criteria for prescribing a rate necessarily differ from criteria for proscribing a rate."

therefore no rate may be "demanded, observed, charged or collected".

After the certificate is issued and complied with, any question arising as to the rate will be resolved in accordance with the provisions of §§ 4 and 5. Section 5(a) governs investigations of rates being charged, initiated either by the Commission on its own motion or upon complaint to it by an interested party; § 4 governs changes in effective rates upon the initiation of the natural gas company charging such rate.

If the Commission were to grant every certificate under § 7 without rate condition, however excessive the price and whatever the impact on the public, and depend upon later investigation and action under § 5(a), no protection from the impact of excessive rates would be possible in the interim.[18] Investigations by the Commission under § 5(a) are long and hearings protracted. As stated by the Commission (J. App. 450a-451a):

> "A proceeding under Section 5(a), moreover, is certain to entail a long delay in terms of time of final decision, and there is no way of undoing the damage done to the public in the interim period. A proceeding under Section 5(a) is, itself, more time consuming than the course of action we employ here, thus administratively more difficult and would confront us with a multiplicity of actions, all brought on by our failure to act in the first instance."

On the other hand, if the Commission under § 7 proceedings were required to investigate and determine the just and reasonable rate as a prerequisite to a rate

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[18] The Commission has no authority to grant reparations.

condition, as suggested by petitioner, it would be required to shoulder a burden which belongs to the applicant. Under §§ 7(c) and (e) *applicant* is the moving party and as such has the burden of proving that the sale as proposed is required by the public convenience and necessity.[19] Petitioner seeks to invoke the § 5(a) provisions which would not only apply a different standard, *i.e.*, whether the proposed rate is just and reasonable, but would place the burden on the Commission or a complainant to prove that proposed rates are unjust or unreasonable.

In attaching the rate condition in the case here under review, the Commission found that the damage to the public interest would have already taken place if the Commission were to permit the rate proposed by petitioner to go into effect without condition and later initiate a rate investigation proceeding under § 5(a) (J. App. 450a-453a). At the same time the Commission specifically pointed out that its action did not "foreclose Signal from filing any changes in its rate structure which it may feel necessary and which it is able to support" (J. App. 452a).

Interim protection to the public is afforded by the attachment of a condition to the certificate allowing initially only a rate required by the public convenience and necessity. Protection to the public after the initial rates become legally effective is afforded under the provisions of § 5(a) authorizing the investigation and determination of just and reasonable rates by the

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[19] As stated by the Commission (J. App. 448a): "In this, a proceeding upon a certificate application, Signal as applicant-seller has the burden of proving all elements of its application so that we may conclude that the service proposed is or will be required by the present or future public convenience and necessity. A vital element of such proof is concerned with the rates proposed."

Commission and under § 4 which permits an applicant to obtain an increase when justified. Thus the sections harmonize. There is no "possibility of conflict" (Pet. 12) between §§ 7 and 5, and effective regulation in the public interest is provided.

Petitioner suggests that the purchaser, Cities Service, might not be willing to amend the contract to permit petitioner to file the lower rate in compliance with the condition (Pet. 18).[20] Significantly, petitioner has refrained from any inquiry to Cities Service on this point. If any such amendment to the contract were necessary, undoubtedly the purchaser would agree since its witness testified that it had originally offered petitioner 8¢, then 10¢, but had been obliged to go to 12¢ to buy the gas (J. App. 2a).

Rather than "eliminate the possibility of conflict between these two separate and distinct regulatory functions of the Commission", as suggested by petitioner (Pet. 12), imposition of § 5(a) standards and procedures in § 7(e) cases would bring about confusion and conflict and prevent timely action by the Commission in the public interest.

5. No Question of Due Process

Based on the assumption that the Commission was required to follow the § 5(a) provisions, petitioner contends that it was deprived of its property without

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[20] Petitioner cites *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) as holding that petitioner may not unilaterally effect a change in "rate". That case involved a proceeding under § 4 of the Act and a rate which had been in effect for years. The Commission's action here under § 7 does not involve a charged rate and does not require any involuntary action by the parties to the contract. They may engage in the sale if they desire to do so on a condition required by the public convenience and necessity. *Supra*, p. 14.

due process of law. It says the Commission gave notice only of a proceeding under § 7, and no notice of a § 5 proceeding (Pet. 21-26).

As shown above, § 5 provisions are not applicable and this contention must be rejected. Petitioner concedes that "the certificate provisions of Sections 7(c) and (e) are not related to any vested or property right of an applicant but instead involve an exercise of discretion by the Commission concerning the ability and willingness of the applicant to perform, as well as matters of public policy and public interest" (Pet. 11). Petitioner has no vested or property right to either a certificate or to a particular rate prior to Commission authorization under § 7. Thereafter petitioner is entitled to such rate as it may justify under the provisions of the Act then applicable.

Since the proceeding was a § 7 proceeding, and the requirements of § 5(a) were not controlling, petitioner received full and adequate notice when informed that a hearing would be held pursuant to § 7 with respect to petitioner's certificate application (J. App. 246a). Additionally, petitioner was informed that Oklahoma Natural and Lone Star were permitted to intervene in opposition to the rate (J. App. 300a-303a, 307a-308a). Furthermore, as heretofore shown, *supra,* pp. 3-5, petitioner was served with numerous pleadings filed by Oklahoma Natural and Lone Star which raised the issue whether the public convenience and necessity would permit certification of petitioner's sale at the rate proposed,[21] and those parties adduced voluminous

[21] Petitioner's contention that it lacked notice of the rate issues is made in face of the fact that it was served with Oklahoma Natural's and Lone Star's petitions to intervene and filed answers to such petitions and other pleadings raising the rate issue (J. App. 249a-256a, 278a-285a, 303a-306a).

evidence at the hearing which showed that the public convenience and necessity did not require issuance of the certificate unless conditioned to require the initial filing of a rate lower than that proposed.

Petitioner quotes from *Morgan* v. *U. S.*, 304 U.S. 1 (1938), to the effect that "[t]hose who are brought into contest with the Government" are entitled to be advised and heard on what the Government proposes before the Government issues its final command (Pet. 19-20). But language immediately preceding that quoted by petitioner covers the situation in this case (304 U.S. at 18):

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

The opposing parties in this proceeding were the interveners. All parties were entitled to a "fair and full hearing" as required by the *Morgan* case. The Commission was required to consider the evidence and opposition of Lone Star and Oklahoma Natural, as well as petitioner's case. Its obligation was to see that petitioner had notice of the claims of Lone Star and Oklahoma Natural and opportunity to meet them. This it did.

Where a proceeding is not initiated by the Government, as it was in the *Morgan* case, but rather by an applicant, as here, and numerous parties intervene raising issues in opposition, no party may be given notice in advance by the deciding body as to what action it proposes to take on issues thus raised since the Commission may act only upon the record after hearing as provided in §7(c).

Petitioner admits that it was fully advised of the issues raised by Oklahoma Natural and Lone Star (Pet. 20-22). It had full opportunity to demonstrate that the issuance of the certificate at the increased rate proposed would be required by the public convenience and necessity. This petitioner failed to do and it cannot now claim that it was not advised of the issues or that it did not have a full opportunity to be heard thereon.

CONCLUSION

There is no reason why this petition should be granted. There is no conflict between circuits, nor is there conflict with decisions of this Court. The Commission action complies with the applicable law and is consistent with the purpose of the Act to protect the public interest.

The petition for *certiorari* should therefore be denied.

Respectfully submitted,

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